CLARK COUNTY, NEVADA

IBLA 90-448 Decided May 28, 1992

Appeal from a decision of the District Manager, Las Vegas District, Nevada, Bureau of Land Management, rejecting an application to amend Recreation and Public Purposes lease N-10138.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Exchanges--Federal Land Policy and Management Act of 1976: Sales--Recreation and Public Purposes Act

   It is proper for BLM to reject an application to amend an existing R&PP lease to permit substantial expansion of a solid-waste management station for collection of household refuse for transfer to a sanitary landfill because the intended expansion is contrary to existing BLM policy restricting authorization of sites for solid-waste disposal and related purposes to FLPMA sales and exchanges pending implementation of the R&PP Amendment Act of 1988, P.L. 100-648, 102 Stat. 3813.

APPEARANCES: Robert T. Schell, Senior Right-of-Way Agent, Clark County Department of Public Works, Las Vegas, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Clark County has appealed from a June 12, 1990, decision by the District Manager, Las Vegas District, Nevada, Bureau of Land Management (BLM), rejecting Clark County's April 11, 1990, application to amend Recreation and Public Purposes (R&PP) lease N-10138.

Lease N-10138 was issued to Clark County pursuant to the R&PP Act, as amended, 43 U.S.C. §§ 869 to 869-4 (1988), effective March 1, 1976. The lease authorized the construction and maintenance of a refuse transfer station, to be known as the "Shelbourne Transfer Station," on 1.25 acres of land in the NE¼ sec. 17, T. 22 S., R. 61 E., Mount Diablo Meridian, Clark County, Nevada. The leased land is on the southern edge of Las Vegas, Nevada, near what was described by BLM as a "developing residential area" (Land Report, dated July 14, 1975, at 3). Under a plan

of development and management incorporated in the lease, the station was to consist of a 6-foot cyclone fence with a gate surrounding 150 by 150 feet of black-topped area containing two 40-cubic-yard dumpsters and was to provide a site where local residents could dump dry refuse. 1/ The refuse was to be removed from the site every day and transferred to an existing sanitary landfill. During normal operating hours, the site is attended by a County employee.

The lease was issued for an initial term of 5 years, with a provision for renewal if Clark County remained in compliance with the plan of development and management. Clark County achieved compliance and the lease was renewed for two additional 5-year terms, with the most recent renewal taking effect March 1, 1986. At the time of the latest renewal two additional stipulations were added to the lease agreement. 2/

On April 11, 1990, Clark County sought to amend its lease to permit expanded use of the facility and add an additional 1.25 acres adjacent to and to the west of the existing parcel. 3/ The County contemplated expansion of the facility and construction of a 180- by 110-foot building to be used to receive trash from garbage collection trucks serving area residences and to transfer it to large trailers for transportation to the sanitary landfill. Three recycling bins would also be constructed for public use and the existing paving would be expanded to facilitate collection truck and public access. The entire site would be enclosed by a chain-link fence. The County explained that it needed to upgrade the station, which served as an area collection point for the southern Las Vegas Valley, to provide "full-scale transfer operations" to serve an "explosive" population growth. The County stated that the expanded transfer station would be maintained in accordance with the existing plan of development and management.

In his June 1990 decision, the District Manager rejected Clark County's amendment application because it was inconsistent with existing BLM policy to "lessen current liabilities for operating sanitary landfills and other related waste management facilities and avoid incurring new liabilities associated with future waste disposal facilities." 4/ The District Manager also noted that BLM's policy statement had been reiterated in Instruction Memorandum (IM) No. 87-477, Change 2, dated February 6, 1989, limiting the authorization of "solid waste disposal facilities" to "a FLPMA Section 203 sale or a FLPMA Section 206 exchange." 5/

1/ Contractors and commercial enterprises are precluded from using the site.

2/ The added stipulations generally prohibited the acceptance of hazardous materials and named Clark County as the party liable for any damages and clean-up costs resulting from acceptance of hazardous materials.

3/ The County also sought an option to purchase the entire site.

4/ This BLM policy had also been outlined in a Dec. 20, 1988, letter to the County from the Director of BLM.

5/ The IM reference was to sections 203 and 206 of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1713 and 1716

The District Manager explained that the County could pursue either a sale or an exchange, noting that a private party had proposed acquisition of the land through an exchange (N-48869) (see 55 FR 22851 (June 4, 1990)) and that the County was free to negotiate for use of the site with that party, if the exchange were to occur. He also expressed BLM's amenability to working with the County to facilitate a sale of the land or an exchange for other public lands. Clark County appealed from the District Manager's decision.

In its statement of reasons for appeal, the County does not dispute BLM's authority to regulate public land use or its right to "avoid the risk associated with some solid waste disposal facilities." It specifically objects to BLM's outright rejection of its proposed facility "without a determination of the relative merits of the * * * facility." The County asserts that its application for a modern facility in which waste material never touches the ground was treated in the same manner as an application for a landfill.

[1] When Congress enacted the R&PP Act it granted the Department discretionary authority to sell or lease public land to a state, county, or other political subdivision for "public purposes." 43 U.S.C. § 869 (1988). Having been given discretion in the grant of a R&PP patent or lease, BLM may reject an application if it states a rational basis for rejection in the record. See The City of Chico, 119 IBLA 136, 138 (1991), and cases cited therein. We will consider whether the record contains a reasonable explanation of a rational basis for rejecting Clark County's application for an amended R&PP lease.

We turn first to IM No. 87-477, Change 2, which states BLM's policy that "solid waste disposal facilities" will be authorized only under sections 203 and 206 of FLPMA. Change 2 to IM No. 87-477 was written to afford interim guidance to BLM pending the promulgation of regulations implementing a recent amendment to the R&PP Act (i.e., section 2 of the R&PP Amendment Act of 1988 (R&PP Amendment Act), P.L. 100-648, 102 Stat. 3813, codified at 43 U.S.C. § 869-2 (1988)). The amendment authorized conveyance of land under the R&PP Act for "solid waste disposal or for another purpose which the Secretary finds may include the disposal, placement, or release of any hazardous substance. [6/]" The conveyance would remain subject to certain constraints set out in the R&PP Amendment Act 7/

---

fn. 5 (continued)
(1988). Both sections provide for the conveyance of public land, either as an outright sale or as an exchange for private lands.

6/ The term "hazardous substance" is given the meaning set out in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9657 (1988). See 43 U.S.C. § 869-2(b)(7) (1988).

7/ Generally, section 2 of the R&PP Amendment Act requires a determination that there are no hazardous substances on the land and that the land
is suitable for the proposed use. The applicant must furnish satisfactory

and a limited reversionary clause, 8/ designed to shield BLM from the liability which could attach to the United States if hazardous substances were deposited on the land. The R&PP Amendment Act "exempt[s] from the usual reverter provisions of the R&PP Act conveyances of areas that are subject to the Solid Waste Disposal Act, as amended, [42 U.S.C. §§ 6901-6987 (1988)]." H.R. Rep. No. 934, 100th Cong., 2d Sess. 4, reprinted in 1988 U.S. Code Cong. & Admin. News 5353 (emphasis added). Thus, if a facility would come within the ambit of the R&PP Amendment Act, it should also be subject to the IM No. 87-477, Change 2, limitation of conveyances to sections 203 and 206 of FLPMA. 9/

It is our opinion that the proposed transfer station would constitute a facility subject to the Solid Waste Disposal Act, and would come within the ambit of the R&PP Amendment Act. Therefore, the interim guidance afforded by IM No. 87-477, Change 2, is applicable. That memorandum specifically stated that "solid waste disposal facilities" include "sanitary landfills" 10/ and "other waste management facilities." Id. at 2. A "solid waste management facility" under the Solid Waste Disposal Act includes "any facility for the collection, source separation, storage, transportation, transfer, processing, treatment or disposal [11/] of

---

fn. 7 (continued)
evidence that it has notified relevant State and Federal agencies; warrant that the land will be used in a manner consistent with all applicable State and Federal laws; and agree to hold the United States harmless from any liability for any violation of applicable laws. See 43 U.S.C. § 869-2(b)(2) through (5) (1988); H.R. Rep. No. 934, 100th Cong., 2d Sess. 5, reprinted in 1988 U.S. Code Cong. & Admin. News 5355.

8/ The statute provides that the Government will retain no reversionary interest if the patented land is to be used for solid-waste disposal or for any other purpose that might result in the disposal, placement, or release of a hazardous substance. See 43 U.S.C. § 869-2(b)(6) (1988).

9/ The legislative history of the R&PP Amendment Act states that BLM imposed a "moratorium on the issuance of new leases or patents under the R&PP Act for purposes of waste disposal sites" pending enactment of legislation. H.R. Rep. No. 934, 100th Cong., 2d Sess. 4, reprinted in 1988 U.S. Code Cong. & Admin. News 5354. That moratorium was effected by IM No. 87-477, dated May 15, 1987, and IM No. 87-477, Change 1, dated Aug. 10, 1988, as continued in IM No. 87-477, Change 2. BLM's moratorium curtailed conveyances subsequently authorized by the R&PP Amendment Act.

10/ "[S]anitary landfills" have a specific meaning under the Solid Waste Disposal Act. See 42 U.S.C. § 6944(a) (1988).

11/ The term "disposal" has a much broader meaning under the Solid Waste Disposal Act than is suggested by its common meaning or the narrow reference to facilities for the permanent disposal or destruction of solid wastes in IM No. 87-477, Change 2. It is defined as the "discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste * * * into or on any land or water so that such solid waste * * * or any constituent thereof may enter the environment or be emitted into

solid wastes * * * whether such facility is associated with facilities generating such wastes or otherwise." 42 U.S.C. § 6903(29) (1988). Under this definition, Clark County's proposed transfer station is a "solid waste management facility." It would provide for the collection, storage, processing, and transfer of solid wastes.

We also recognize that the overriding concern of Congress when it enacted the R&PP Amendment Act was the use of the land for processing solid waste which may release a hazardous substance. See H.R. Rep. No. 934, 100th Cong., 2d Sess. 4, reprinted in 1988 U.S. Code Cong. & Admin. News 5354. The Act covers the use of land for "disposal, placement, or release of any hazardous substance." 43 U.S.C. § 869-2(b)(1) (1988). Thus, the Act contemplates any situation in which the release of such substances might occur. Hazardous substances in household refuse could clearly be placed in the County's proposed transfer station. See 56 FR 61105 (Nov. 29, 1991). The last renewed R&PP lease indicated that such substances could be brought to the site in "household amounts." Although the quantity of such substances placed on the site pursuant to the approved use is probably insignificant, the proposed facility would clearly increase both the quantity and variety of hazardous substances brought on site. For this reason, it was not unreasonable for BLM to consider the proposed use in light of the R&PP Amendment Act. 43 U.S.C. § 869-2(b)(1) (1988).

The facts presented by the County support a conclusion that the proposed station is a facility that would require authorization under the R&PP Amendment Act, and that it was subject to the interim guidance in IM No. 87-477, Change 2, requiring authorization under sections 203 or 206 of FLPMA. As a matter of BLM policy, authorization of an amendment to the existing R&PP lease to encompass that station is not currently permitted under the R&PP Act.

Clark County argues finally that the moratorium on the issuance of R&PP leases and patents effected by BLM (as embodied in IM No. 87-477 and its changes) "should have ended with the passage of [the R&PP Amendment Act]" when BLM could, if it had acted expeditiously to promulgate implementing regulations, have issued a patent. Regardless of what might be alleged regarding the speed of BLM's action in the promulgation of applicable regulations, the statute precluded issuance of a patent before their promulgation. See 102 Stat. 3815 (1988). Thus, it was proper for BLM to continue the moratorium. Nor are we in a position to dictate policy matters to BLM when its policy is not shown to be in conflict with relevant statutes or regulations. See Phillips Petroleum Co., 117 IBLA 255, 261 (1991). No conflict has been shown. Until final regulations have been

---

fn. 11 (continued)
the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3) (1988). That definition clearly encompasses a temporary collection facility. The facility may be secure, but there is a possibility that the waste may enter the environment.

published in the Federal Register and submitted to the specified committees of the House and Senate, the Department is precluded by section 4(a) of the R&PP Amendment Act, P.L. 100-648, 102 Stat. 3815 (1988), from issuing any R&PP patent for such a site.

We conclude that there was a basis for BLM's adopting a policy limiting the authorization of solid-waste management facilities to sections 203 and 206 of FLPMA and seeking to avoid incurring new liabilities for such facilities. In turn, the District Manager had a rational basis for exercising his discretionary authority to reject the County's application to amend its R&PP lease N-10138 to permit an upgrading of the existing Shelbourne Transfer Station. See State of Utah, Division of Wildlife Resources, 83 IBLA 298 (1984), and Board of County Commissioners, Ouray County, Colorado, 22 IBLA 182 (1975) (rejection based on BLM policy).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

_____
R. W. Mullen
Administrative Judge

I concur:

_____
Bruce R. Harris
Deputy Chief Administrative Judge